

Federal Court



Cour fédérale

Date: 20130514

Docket: IMM-9167-12

Citation: 2013 FC 506

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, May 14, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**CARLOS ALBERTO PEREZ PEREZ
MARIA OBDULIA SANTES LOPEZ
PAMELA PEREZ SANTES
CARLOS ARNOLDO PEREZ SANTES
MELISSA PEREZ SANTES**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicants seek judicial review of the August 13, 2013, decision in which the Refugee Protection Division [RPD] of the Immigration and Refugee Board found that they were

neither Convention refugees nor persons in need of protection pursuant to section 96 and subsection 97(1), respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c. 27.

II. Facts

[2] The principal applicant, Carlos Alberto Perez Perez, his wife, Maria Obdulia Santes Lopez, and their three minor children, Pamela Perez Santes, Carlos Arnaldo Perez Santes and Melissa Perez Santes, are citizens of the United Mexican States who arrived in Canada on April 5, 2009, and made a claim for refugee protection shortly thereafter. Their claim was based on the applicant's fear of persecution by his former employer, Jorge Alberto Fernandez Solis, whom, according to the principal applicant, was involved in [TRANSLATION] "illegal activities, such as banking transactions related to drug trafficking and criminal acts" that he conducted in his company's name.

[3] The principal applicant alleges that he co-owned a small telephone equipment store with his brother-in-law, Domingo Cesar Santes Lopez.

[4] In 2007, the principal applicant allegedly began doing business with Jorge Fernandez. On August 17, 2007, they purportedly incorporated a federal public services company, called Metro Transportes Terrestres SA de CV, in which the principal applicant held 10% of the shares.

[5] As of October 1, 2008, the principal applicant also allegedly worked for a property management company, called Global Corporativo de Comercio Exterior S.C. The company was part of the Ferso group, of which Jorge Alberto Fernandez Solis was the sole owner. The

principal applicant was responsible for performing administrative duties and some of the company's banking transactions, as well as client management.

[6] The principal applicant's problems allegedly began in early October 2008. One day, a certain Salvatore Ponce, one of the owners of the properties managed by the principal applicant's employer, allegedly told the principal applicant that while visiting his property, he discovered blood on the walls, as well as licence plates, voter registration cards and a severed human hand. During that encounter, specific reference was also allegedly made to the status of the client's overdue accounts.

[7] A few days later, Jorge Alberto Fernandez Solis allegedly caught wind of that exchange. Believing that the principal applicant now had information about his company's illegal activities, he allegedly began to threaten the principal applicant indicating to him that by working for his company, he was complicit in all its illegal activities. From that day on, the principal applicant's wife also allegedly received anonymous kidnapping and death threats over the phone.

[8] The principal applicant alleges that, for fear of his safety and that of his family, he continued to work for Jorge Alberto Fernandez Solis. Also, for fear that Jorge Alberto Fernandez Solis had police contacts, he made no attempt to file a complaint with the police.

[9] The principal applicant alleges that, towards the end of November 2008, a man, whom the principal applicant later identified as Juan Carlos Carranza, a man close to Jorge Alberto Fernandez Solis, went to the principal applicant's house seeking a protective quota of 10,000

Mexican pesos. The principal applicant alleges that he gave in to those demands, paying a total of 5,000 pesos in November and December 2008 and January, February and March 2009.

[10] Later, in December 2008, the telephone equipment store that the principal applicant co-owned with his brother-in-law was robbed by unknown men with firearms. In addition, Jorge Alberto Fernandez Solis allegedly took the principal applicant's truck and allegedly forced him, on the pain of death, to transfer all his shares in Metro Transportes Terrestres SA de CV to one Carlos Alfonso Pantoja, a member of Jorge Alberto Fernandez Solis's family.

[11] Following those incidents, the principal applicant decided to leave Mexico for good. In January 2009, the principal applicant obtained passports for his children and the entire family and went to stay with his brother in Ciudad Isla, prior to boarding a flight bound for Canada in early April 2009.

[12] The applicants' claim for refugee protection was heard before the RPD on June 13, 2012.

[13] On May 19, 2012, the principal applicant's brother-in-law was killed in the village of La Vibora, in the north, in the State of Veracruz. According to the death certificate on file, the cause of death was [TRANSLATION] "a gunshot wound to the chest with puncturing of the organs and hemorrhage." This came out at the hearing before the RPD. The principal applicant alleged that prior to his death, his brother-in-law told him that unknown individuals went to his store and asked him questions about the applicants.

[14] Following the hearing, while the matter was under reserve, the principal applicant submitted the original death certificate, accompanied by a certification of facts from the Office of the Attorney General of Justice of the State of Veracruz and an internal review report from the Forensic Services Directorate of the government of the State of Veracruz, attesting to his brother-in-law's murder.

[15] The applicants' claim for refugee protection was dismissed on August 13, 2012.

III. Decision under review

[16] The grounds for the refusal are essentially based on the principal applicant's lack of credibility, as well as the applicants' lack of subjective fear of persecution and their failure to seek protection from their State prior to seeking international protection.

Credibility, lack of corroborating evidence and lack of objective fear

[17] The RPD mentioned that the principal applicant and his wife contradicted each other as to their agent of persecution. At the hearing, they both stated that they feared the Zetas, whom, according to them, were responsible for the threats uttered against them, whereas in their initial claim the applicants made no reference to the criminal organization. When asked why the principal applicant only identified his former employer, Jorge Alberto Fernandez Solis, as being the person whom he feared, he indicated that when he arrived in Canada, he still feared the Zetas and believed Jorge Alberto Fernandez Solis had ties to the Zetas and intended to involve him in the same criminal network, an explanation the RPD did not accept.

[18] The RPD noted that the principal applicant's story was confusing. The RPD also found it implausible that the principal applicant did nothing after learning about the traces of blood and the severed human hand in one of the buildings managed by his company. The RPD found it implausible that in such a situation, the principal applicant simply took care of the client's overdue accounts without doing anything else and without notifying his boss or police. The RPD also noted that the applicants were hesitant and unable to explain exactly why the principal applicant was sought out and threatened by telephone and what exactly he was asked to do.

[19] More fundamentally, the RPD noted that no corroborating documentary evidence was filed either to establish any business link between the principal applicant and Jorge Alberto Fernandez Solis or to demonstrate that the principal applicant co-owned his brother-in-law's telephone equipment business. At the hearing, the principal applicant mentioned that, when he left Mexico, he handed the business over to his brother-in-law but that he had no evidence to demonstrate that they both co-owned the business as he trusted his brother-in-law completely. The principal applicant stated that it did not occur to him to obtain the evidence required by the RPD. The RPD noted that the onus is on refugee claimants to provide evidence of their allegations using documents they could have reasonably had access to and which and that this was not done in the applicants' case.

[20] The RPD concluded that the applicants were unable to credibly demonstrate the well-foundedness of both an objective and subjective fear of persecution.

Lack of subjective fear

[21] The RPD also noted that the principal applicant acted in a manner contrary to that of a person who really fears for his life and safety by continuing to work in collaboration with his agent of persecution until January 2009, and by waiting three months to board a flight to Canada when, according to his testimony before the RPD, he had decided to leave Mexico in December 2008. The principal applicant explained that he deliberately acted in that manner because he did not want to give the impression that he was fleeing his country and preferred to have people believe he was leaving on vacation with his family. The RPD found that explanation not to be credible and drew a negative inference with respect to his subjective fear of persecution.

State protection

[22] The RPD noted that the principal applicant cannot base his failure to seek protection from Mexican authorities on the mere fact that he believes there is impunity and corruption within state organizations and police forces. Thus, the primary issue for the RPD was that, because he never sought assistance and protection from his country's authorities and did not take any formal steps to report the persecution he was being subjected to, the principal applicant did not rebut with "clear and convincing" evidence the presumption that Mexico, like any other State that is not in a situation of complete breakdown of state apparatus, is capable of protecting its citizens.

[23] Accordingly, the RPD decided that the applicants did not demonstrate that there is a serious possibility that they will face persecution on a Convention ground, or that, on a balance of probabilities, they would be subjected personally to a risk to their life, a risk of cruel and unusual treatment or punishment, or a danger of torture, should he return to their country.

IV. Issues

[24] With respect to their brief written submissions, the applicants raised two issues against the RPD's decision:

- (a) Did the RPD err in failing to consider a fundamental element of the claim for refugee protection, namely, the murder of the principal applicant's brother-in-law who was his business partner?
- (b) Did the RPD err in requiring the principal applicant to provide documentary evidence to corroborate his allegations that (i) he was employed by Global Corporativo de Comercio Exterior S.C.; and (ii) that he co-owned, with his brother-in-law, the telephone equipment business?

[25] The respondent submits that the applicants' failure to challenge the reasonableness of a determinative finding of the RPD, that of the availability of state protection in Mexico for the applicants, is sufficient to dismiss this application for judicial review. The respondent adds the following issues:

- (c) Was it reasonably open to the RPD to find that state protection was available to the applicants?
- (d) Should the application for judicial review be dismissed on the basis of the applicants' failure to challenge a determinative finding?

Relevant issues regarding the Court

[26] For its part, the Court is concerned with two issues to assess, and also the analysis concerning the availability of state protection for the applicants:

- (1) Did the RPD err in its assessment of the objective basis of the principal applicant's fear?
- (2) Is the RPD's finding regarding the presumption of availability of state protection reasonable and determinative in the circumstances?

V. Standard of review

[27] It is settled law that the standard of review on a state protection, as well as credibility findings, is reasonableness (*Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paragraph 36; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL/Lexis) (FCA) at paragraph 4; *Tamas v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1361 at paragraphs 20-22).

[28] On a standard of reasonableness, the Court will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v Nouveau-Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 47). Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI. Analysis

(1) Did the RPD err in its assessment of the objective basis of the principal applicant's fear?

[29] There is a strong link between the two issues raised by the applicants in this proceeding, the objective basis of their fear. It is true that the RPD did not take into account the murder of the principal applicant's brother-in-law (three years following their own problem) in the analysis of the well-foundedness of the applicants' fear, nor did it care to mention that fact in its grounds. However, given the three-year gap, the Court is not satisfied that its intervention is required in this case, namely for two other important reasons.

[30] First, it was open to the RPD to require from the applicant documentary evidence corroborating his ties and his involvement in the company Global Corporativo de Comercio Exterior S.C. as well as in the telephone equipment business which he and his brother-in-law allegedly owned.

[31] Section 11 of the *Refugee Protection Division Rules*, SOR/2012-256 specifically provides that “[t]he claimant must provide acceptable documents establishing their *identity and other elements of the claim*. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.” [Emphasis added.]

[32] Moreover, it is settled law that the RPD may draw an adverse inference as to the applicants' credibility where their account is implausible and they offer no evidence to

corroborate their allegations. Simon Noël J. reiterated that principle in *Encinas v Canada (Minister of Citizenship and Immigration)*, 2006 FC 61, where he wrote the following:

[21] I would add that it is clear from reading the transcript of the hearing that the applicants did not discharge their onus of proof to convince the RPD that their claim was well-founded. Indeed, the RPD informed them more than once that certain facts should have been put in evidence (the employment relationship in 2003, for example). Consequently, the RPD, not having at its disposal the evidence that it would have liked to receive, found that the version of the facts in the claim was not credible. That finding was certainly open to the RPD. (See *Muthiyansa and Minister of Citizenship and Immigration*, 2001 FCT 17, [2001] F.C.J. No. 162, at para. 13).

[33] However, the principal applicant did not produce any evidence corroborating his allegation that he was a business partner with his brother-in-law, nor evidence of the existence of the business he claims to have co-owned. In the circumstances, since there was no evidentiary basis for this element of the refugee claim, the evidence of the murder of the principal applicant's brother-in-law was only incidental, and therefore, the RPD's failure to address it in its reasons does not render the totality of its reasoning unreasonable. In other words, it is only if the RPD was satisfied of the existence of the alleged business relationship between the principal applicant and his brother-in-law that the evidence of the brother-in-law's death would have had an impact on the outcome of the claim.

[34] Second, in light of the transcript of the hearing, it turns out that the RPD extensively questioned the applicants about the incident. Despite the fact that a number of the RPD's questions specifically zeroed in on the principal applicant's business relationship with his brother-in-law, it was not satisfied with the answers provided. Accordingly, the Court is not satisfied that the RPD ignored an essential element of the claim before it, or that the RPD would not have otherwise erred in its assessment of the objective basis of the applicants' fear.

[35] The applicants did not deem it appropriate to challenge all of the RPD's non-credibility and implausibility findings. The Court would like to note that the RPD appeared to have demonstrated a certain degree of overzealousness at the hearing; that is why the Court obligates itself to pay attention to the exchanges between the interpreter and the decision-maker at first instance when the interpreter required a break upon feeling somewhat uncomfortable. (The Court notes that the hearing was held, nonetheless, with significant weaknesses with respect to the principal applicant's testimony and his supporting evidence or lack thereof, which did not help his cause. In light of the Court's remarks in that paragraph, the Court thoroughly reviewed the transcript in its entirety to ensure that the entire hearing was not affected by a failure on the part of the RPD which would have cast doubt on the fairness of the hearing (*Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202).

[36] It is entirely open to the RPD to verify and comment on the accuracy of the statements. Nonetheless, the case law of the Federal Court indicates that the RPD must, in a manner appropriate for a first-instance decision-maker, ensure that it verifies at the hearing every inconsistency, real or apparent, in the applicant's account of persecution without criticizing, blaming, making disparaging comments or showing unjustified aggression and impatience toward the applicant which could inhibit the applicant's testimony, particularly because this should be the claimant's opportunity to be heard within an atmosphere conducive to active listening (*Kabongo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1106, 397 FTR 191 at paragraph 38; also, *Jaouadi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1347, 257 FTR 161; *Guermache v Canada (Minister of Citizenship and Immigration)*, 2004 FC 870, 257 FTR

272; *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 179 at paragraphs 44-45).

(2) Is the RPD's finding on the availability of state protection reasonable and determinative in the circumstances?

[37] There is no dispute that the onus is on the applicants to rebut the presumption of state protection with "clear and convincing evidence," and that absent a situation of complete breakdown of state apparatus, it should be assumed that the state is capable of protecting its citizens (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at paragraph 50). However, in this case, there is nothing to contradict the RPD's finding that the principal applicant did not take any steps to seek protection from Mexican authorities, police or others, and that he therefore failed to rebut the presumption in this case.

[38] As stated earlier, the principal applicant does not challenge this finding before the Court. In *Cienfuegos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1262 at paragraphs 25-26, this Court held that a determinative negative credibility finding that was not challenged must be presumed to be true and alone constitutes a sufficient basis for justifying the dismissal of the application for judicial review. The same is true in the present case with respect to the RPD's finding of fact that the principal applicant failed to seek protection from his State.

[39] The principal applicant testified before the la RPD that it was out of fear that he did not contact police from October to December 2008, and especially because he was convinced that the police would not assist him. The case law is clear and consistent on this issue. To quote

Justice Michael Phelan in *Martinez v Canada (Minister of Citizenship and Immigration)*, 2005

FC 1050:

[7] What is crucial to this case is that the Applicant made only two attempts to seek assistance, one of which was to police who had no local jurisdiction to deal with her complaint. She then formed the opinion that no other assistance would be forthcoming. This purely subjective view of the adequacy of Costa Rica state protection is not "direct, relevant and compelling" evidence of the inadequacy of state protection.

...

[9] The determination of adequacy of state protection cannot rest on the subjective fear of an applicant. Whatever the depth of the Applicant's belief, she must do more than she did given the evidence of the nature of the political, judicial and administrative structure of Costa Rica. The RPD's conclusion that the Applicant had "to do more" is itself more than reasonable. [Emphasis added.]

VII. Conclusion

[40] For all the foregoing reasons, the applicants' application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that the applicants' application for judicial review be dismissed, with no question of general importance to certify.

“Michel M.J. Shore”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-9167-12

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THE MINISTER OF CITIZENSHIP AND
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PLACE OF HEARING: Montréal, Quebec

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**REASONS FOR JUDGMENT
AND JUDGMENT BY:** SHORE J.

DATED: May 14, 2013

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